

123 FERC ¶ 61,276
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

North American Electric Reliability Council, North American Electric Reliability Corporation	Docket No. RR06-1-014
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-003
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-003
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-003
Delegation Agreement Between the North American Electric Reliability Corporation and ReliabilityFirst Corporation	Docket No. RR07-4-003
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-004
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-003
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR07-7-003

Delegation Agreement Between the North American
Electric Reliability Corporation and Florida
Reliability Coordinating Council.

Docket No. RR07-8-003

North American Electric Reliability Corporation and
Western Electricity Coordinating Council

Docket No. RR08-2-001

ORDER ON REHEARING

(Issued June 17, 2008)

1. The North American Electric Reliability Corporation (NERC) seeks rehearing of a Commission order issued in this proceeding on March 21, 2008 (March 21 Order).¹ For the reasons discussed below, we grant rehearing, as requested. We also require that the Delegation Agreement entered into between NERC and ReliabilityFirst Corporation (RFC) be revised in a compliance filing.

Background

2. In the March 21 Order, the Commission addressed NERC's proposed modifications to NERC's *pro forma* Delegation Agreement and each of the eight NERC/Regional Entity delegation agreements. With respect to NERC's proposed revisions to the NERC Hearing Procedures (an exhibit to the *pro forma* Delegation Agreement), the March 21 Order required NERC to adopt, in both the NERC Hearing Procedures and the NERC Rules of Procedures, a revision that had been included by NERC and RFC in the RFC Delegation Agreement, at Exhibit D, P 1.1.5 (RFC Definition), addressing the term "Critical Energy Infrastructure Information" (CEII).²

3. The RFC Definition defines CEII using the same definition of that term, as set forth in the Commission's regulations.³ Specifically, CEII is defined as "specific engineering, vulnerability, or detailed design information about proposed or existing

¹ *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 (2008) (March 21 Order).

² *Id.* P 75.

³ See 18 C.F.R. § 388.113(c)(1) (2007), adopted in *Critical Energy Infrastructure Information*, Order No. 683, FERC Stats. & Regs. ¶ 31,228 (2006).

critical infrastructure that: (1) relates details about the production, generation, transportation, transmission, or distribution of energy; (2) could be useful to a person in planning an attack on critical infrastructure; (3) is exempt from mandatory disclosure under the Freedom of Information Act [FOIA], 5 U.S.C. 552 (2000); and (4) does not simply give the general location of the critical infrastructure.”

4. In the March 21 Order, the Commission found that the RFC Definition “reflects the Commission’s most recent amendment of this term in Order No. 683.”⁴ The Commission, however, provided no further elaboration regarding the appropriateness of requiring a NERC hearing body to make FOIA exemption determinations.

Request for Rehearing

5. NERC, on rehearing, requests that it not be required to adopt the RFC Definition in its entirety, i.e., that it not be required to adopt the clause addressing FOIA disclosure exemptions. NERC asserts that while a requirement that a CEII request be based, in part, on a FOIA exemption determination is appropriate in the context of the Commission’s own determinations, such a requirement is not substantively useful, or otherwise necessary, in identifying what information should be treated as CEII in the context of a NERC hearing. NERC asserts that in a hearing subject to its Compliance Monitoring Enforcement Program rules, there is no need to determine whether information for which CEII treatment is sought would be exempt from disclosure under FOIA. NERC notes that any such determination would be required to be made based on a hypothetical assumption, i.e., based on whether the exemption would apply were the information at issue in the hands of a federal agency. NERC further asserts that neither it nor its Regional Entities are qualified to make such determinations.

Discussion

6. We grant rehearing of the March 21 Order, as requested. Specifically, we will not require NERC to adopt, in the NERC Hearing Procedures and the NERC Rules of Procedures, the CEII clause in 18 C.F.R. § 388.113(c)(1)(iii) regarding FOIA exemption determinations.

7. We agree with NERC that while the FOIA exemption clause is meaningful in the context of the Commission’s own CEII determinations, this same provision, as applied in the context of a NERC hearing body determination, provides neither a relevant nor a

⁴ March 21 Order, 122 FERC ¶ 61,245 at P 75.

practical measure useful in the assessment of whether a request for CEII treatment should be granted. This finding, rather, can be adequately made based on the three remaining components set forth at section 388.113(c)(1), namely, whether the information at issue: (1) relates details about the production, generation, transportation, transmission, or distribution of energy; (2) could be useful to a person in planning an attack on critical infrastructure; and (3) does not simply give the general location of the critical infrastructure.

8. Given the unnecessary confusion that may result in the attempted application of the FOIA exemption requirement in the context of an RFC hearing, we also require that NERC and RFC revise that portion of the RFC hearing procedures, as incorporated in the RFC Delegation Agreement, in a compliance filing to be made within 30 days of the date of this order.

The Commission orders:

(A) Rehearing of the March 21 Order is hereby granted, as discussed in the body of this order.

(B) NERC and RFC are hereby directed to revise the RFC Delegation Agreement, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.